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IN THE

Supreme Court of the United States

October Term, 1990

MYRA JO COLLINS,

Petitioner,

v.

CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America [ATLA] is a voluntary national bar association whose approximately 65,000 members primarily represent those who have suffered personal injury, deprivation of civil rights, or economic harm, as well as those who stand accused of crimes.

The vindication of constitutional rights not only provides compensation for victims, but it also deters future violations by agents of the government. The scope of the statute primarily used to enforce constitutional rights is at issue in this case, and this Court's resolution of that issue will directly affect the ability of ATLA members to vindicate the constitutional rights of clients.

ATLA therefore respectfully submits this brief as amicus curiae. The written consents of both parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

As a remedial legislation, 42 U.S.C. §1983 is to be construed generously in order to further its primary purpose of vindicating cherished constitutional guarantees.

To properly state a claim pursuant to 42 U.S.C. §1983, it is necessary to plead two, and only two, elements: that the defendant acted under color of law and that the plaintiff's constitutional rights were violated. The facts necessary to prove a constitutional violation vary significantly depending upon the nature of the alleged constitutional violation.

Regardless of the constitutional violation alleged, "abuse of government power" is not a separate and distinct element necessary to state a claim pursuant to 42 U.S.C. §1983.

Where a plaintiff alleges that a municipality violated a substantive Due Process right for failure to train employees, the degree of fault necessary to rise to the level of a constitutional violation is "deliberate indifference" on

the part of the municipality. A municipality's deliberate indifference to constitutional rights *is* an abuse of government power.

Governmental conduct may fall squarely within traditional tort law and still give rise to a constitutional violation. Overlapping state court remedies are generally irrelevant to the question of the existence of a cause of action under §1983.

The government need not act in a way that is essentially indistinguishable from a private employer in order to state a claim under §1983. Individuals do not lose constitutional rights merely because they work for the government instead of a private employer.

State law may create a liberty interest protected by the United States Constitution. The Texas Hazard Communication Act uses language of unmistakably mandatory character creating a substantive limitation on official discretion. A liberty interest recognized by the Due Process Clause of the United States Constitution is thereby created.

ARGUMENT

I. ABUSE OF GOVERNMENT POWER IS INFERRED WHEN A MUNICIPALITY DEMONSTRATES DELIBERATE INDIFFERENCE IN TRAINING EMPLOYEES.

A. A Claim Under 42 U.S.C. §1983 Must Allege Only That Plaintiff Was Deprived Of A Federal Right And That The Person Who Violated That Right Acted Under Color Of State Law.

Title 42 U.S.C. §1983 was enacted to aid in "the preservation of human liberty and human rights." *Owen v. City of Independence*, 445 U.S. 622, 636 (1980). Section 1983 reflects a congressional judgment that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." 445 U.S. at 639. As remedial legislation, §1983 is to be construed generously to further its primary purpose. *Id.* at 631-32; *Gomez v. Toledo*, 446 U.S. 635 (1980).

In *Gomez v. Toledo*, the Court ruled that nothing in the language of the statute or the legislative history of §1983 required the petitioner to affirmatively allege that a public official acted in bad faith in order to state a claim for relief. In so ruling, the Court explicitly held:

> [B]y the plain terms of §1983, two, and only two, allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of the federal right. Second, he must allege that the person who has deprived him of that right acted under color of state law or territorial law.

445 U.S. at 638; *See also Parratt v. Taylor*, 451 U.S. 527, 535 (1981)("The conduct complained of was committed by a person acting under color of state law" and that "this conduct deprived [petitioner] of rights, privileges, or immunities secured by the Constitution or laws of the United States").

As applied to the case at bar, petitioner is only required to allege that the respondent violated a federal constitutional right, and that it did so while acting under color of law. The court below, however, ruled explicitly to the contrary.

According to the Fifth Circuit, in addition to the constitutional deprivation element, there also exists a separate "abuse of government power" element which also must be satisfied. "We base our holding on the abuse of power standard, separate from the constitutional deprivation element or standard." *Collins v. City of Harker Heights, Texas*, 916 F.2d 284, 286 (5th Cir. 1990).

> In this Circuit, there is a separate standard that must also be satisfied - an abuse of government power. While this element is in many ways similar to, and often blends with other necessary elements of a §1983 action, such as deprivation of a constitutional right, and springs from the same sources as the deprivation element, it is separate nonetheless.

Id. at 287.

Because the Fifth Circuit found no "abuse of government power," the court found it unnecessary to determine whether the respondent violated the petitioner's

constitutional rights.

> [O]ur holding is grounded in the abuse of power standard, which pertains to the decedent's relationship with the City - one of employer and employee, rather than one in which the city, as government, acted against the decedent, as governed. Therefore, it is not necessary to reach another of the standards, or elements, necessary for a §1983 action, whether there is a deprivation of a constitutional right.

Id.

In support of its position that §1983 requires "abuse of government power" as a separate and distinct element in addition to a constitutional violation, the Fifth Circuit relied most notably upon *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) and *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989). The Fifth Circuit also looked to *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir. 1985); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987); and *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir. 1986). Significantly, these cases were decided before *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), in which this Court made clear that "abuse of government power" does not consitute a separate element of a § 1983 claim.

The Fifth Circuit's understanding of §1983 is clearly in error. As already stated, plaintiff need only allege a violation of a constitutional right and that the right was violated by a person acting under color of law. *Gomez v. Toledo, supra*. Where a deliberate indifference in training is alleged, that conduct constitutes an abuse of government power and satisfies the constitutional deprivation element

necessary to state a claim under §1983. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

Harris is particularly helpful. This Court specifically considered the standard applicable for determining a municipality's liability for its failure to train its police officers. The abuse of government power standard is satisfied where government misconduct rises to the level of deliberate indifference to plaintiff's constitutional rights. Where government officials demonstrate a deliberate indifference, "such a shortcoming [may] be properly thought of as a city policy or custom that is actionable under §1983." 489 U.S. at 389. [1] A government policy of deliberate indifference to constitutional rights is abuse of government power of a constitutional dimension, and more than a state tort. *Id.*

> Consequently, while claims such as respondent's -- alleging that the city's failure to provide training to municipal employees resulted in the constitutional deprivation she suffered -- are cognizable under §1983, they can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.

489 U.S. at 392.

The court in *Harris* acknowledged the possibility that the need for training may be so obvious and the inadequacy

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[1] "Where a §1983 plaintiff can establish that the facts available to city policy makers put them on actual or constructive notice that the particular omission [in training] is substantially certain to result in the violation of constitutional rights of their citizens, the dictates of *Monell* are satisfied." (O'Connor J., concurring in part and dissenting in part); *Harris*, 109 S.Ct. at 1208.

so likely to result in constitutional violations, "that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 390. Under those circumstances, petitioner states a claim under §1983. *See also, Ruge v. City of Bellevue*, 892 F.2d 738, 742 (5th Cir. 1989) ("We deem a policy, if adopted and proven, that would show that a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act").

The Fifth Circuit attempted to distinguish *Harris* on the grounds that "it pertains to cases concerning use of governmental power on the governed." *Collins*, 916 F.2d at 287. However, nothing in *Harris* suggests that government employees should enjoy less constitutional protection than other persons. In many instances, a municipal employee enjoys constitutional protection only because his employer is the government. (*See* Section IC, below). According to *Harris*, municipalities are liable under §1983 only where "that city's failure to train reflects deliberate indifference to the constitutional rights of its *inhabitants*." 489 U.S. at 392 (emphasis added). Workers do not forfeit their status as inhabitants merely because the government is the employer.

The Fifth Circuit's reading of *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), is also misguided. The court found in *DeShaney* a ruling that even where all other elements of the §1983 claim are present (including a constitutional violation), not all injuries arising out of an association or relationship with the government give rise to a §1983 claim. *Collins*, 916 F.2d at 289.

This reading does violence to the plain language of *DeShaney*. This Court did not hold that despite a

constitutional violation, petitioner failed to state a claim under §1983. Rather, the *DeShaney* Court ruled that there existed no constitutional violation at all because the Due Process Clause did not "protect the life, liberty and property of its citizens against invasion by private actors." *DeShaney*, 109 S.Ct. at 1003. This Court clearly explained, "as a general matter, then, we conclude that a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 1004.

Also, in *DeShaney* the Court expressly noted that the state did nothing "to render [the victim] more vulnerable to [known] dangers." 109 S.Ct. at 1006; *Gibson v. City of Chicago*, 916 F.2d 1510, 1519 n.19 (7th Cir. 1990).

In the case at bar, it is alleged that the City of Harker Heights sent Mr. Collins to work under conditions which it knew were deadly. It is alleged that the respondents' complete failure to train its employee to protect himself from known dangers constitutes deliberate indifference to fundamental Due Process rights. These allegations are distinguishable from those of *DeShaney*, and constitute an abuse of power stating a claim under §1983.

The Fifth Circuit's reliance upon *de Jesus* springs from the notion the that "one does not state a constitutional claim merely by alleging ordinary negligence...." 883 F.2d at 387 (citing *Rankin*, 762 F.2d at 447). Regrettably, the Court in *de Jesus* made no attempt to distinguish *Harris*.

Any reliance upon *Davidson v. Cannon*, 474 U.S. 344 (1986) or *Daniels v. Williams*, 474 U.S. 327 (1986) is also misplaced. In both instances, the Court simply held that abuse of government power could not be inferred when the

petitioner alleges that a municipal official was *merely negligent.*

Similarly, in *Daniels v. Williams*, 474 U.S. 327, 328 (1986), this Court considered an inmate's §1983 claim for damages for injuries allegedly sustained in a Richmond, Virginia jail when he slipped on a pail negligently left on a stairway by a sheriff's deputy. The court acknowledged that abuse of government power would be an element necessary to prove that the Due Process Clause of the constitution had been violated. However, the Court in *Daniels* only held that mere negligence by a municipality did not rise to the level of an abuse of power which would be constitutionally recognized.

> Far from an abuse of power, lack of due process, suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injuries caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries old principle of due process law.

Daniels v. Williams, 474 U.S. at 330.

In *Davidson v. Cannon*, 474 U.S. 344 (1986), this Court again considered a claim under §1983 alleging that a state official had been negligent by failing to protect plaintiff from another inmate. The Court in *Davidson* reiterated its holding in *Daniels* that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property. *Davidson*, 474 U.S. at 346.

> Far from abusing governmental power, or employing it as an instrument of oppression, respondent Cannon mistakenly believed that the situation was not particularly serious and respondent James simply forgot about the note. The guarantee of due process has never been understood to mean that the state must guarantee due care of its officials.

Id. at 670.

The result in *Davidson v. Cannon* would clearly have been different if the petitioner had alleged that the municipality acted with deliberate and callous indifference to federally protected rights.[2]

In the case at bar, petitioner has not alleged mere negligence. The petitioner's estate has alleged a deliberate indifference to the deceased's federally protected rights under the Due Process Clause. This allegation distinguishes it from both *Daniels* and *Davidson.*

B. Government Conduct May Fall Squarely Within Traditional Tort Law And Still Give Rise To A Constitutional Violation Actionable Under 42 U.S.C. §1983.

It appears that the availability of a state tort remedy, at least in part, explains the Fifth Circuit's ruling that plaintiff's factual allegations did not state a claim under §1983. *Collins v. City of Harker Heights, Texas*, 916 F.2d 284, 287-288 (5th Cir. 1990) (The constitution does not purport to supplant traditional tort law); *Daniels v.*

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[2] The district court in *Davidson* expressly found that the respondent did not act with deliberate and callous indifference. This finding was not challenged on appeal. *Davidson*, 474 U.S. at 347.

Williams, 474 U.S. 327, 330 (1986)("We have previously rejected reasoning that would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states."); *de Jesus Benavides v. Santos*, 833 F.2d 385, 388 (5th Cir. 1989) ("§1983 does not federalize tort law. While reckless or grossly negligent conduct...may cause injury..., a claim against the officials on that basis falls 'squarely within traditional state tort law'"); *Washington v. District of Columbia*, 802 F.2d 1478, 1480 (D.C. Cir. 1986) ("The Supreme Court has repeatedly warned that §1983 must not be used to duplicate state tort law on the federal level"); *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986)("the constitution does not duplicate duties of care in the common law of torts").

However, state common law torts and constitutional violations actionable under 42 U.S.C. §1983 are not mutually exclusive. The availability of a state tort remedy does not preclude a claim under §1983.

> Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under §1983. A plaintiff, for example, may bring a §1983 action for an unlawful search and seizure despite the fact that search and seizure violates the state's constitution or statues, and despite the fact that there are common law remedies for trespass and conversion.

Zinermon v. Burch, 494 U.S. 113, 130-31 (1990).

Where a plaintiff claims a violation of substantive Due Process, the court in *Zinermon* held explicitly held that "'a plaintiff, under *Monroe v. Pape*, may invoke §1983

regardless of any state tort remedy that might be available to compensate him for the deprivation of these rights." *Id.* at 131.

In *Adams Fruit Co., Inc. v. Rabbett*, 110 S.Ct. 1384 (1990) the Court held that the exclusivity provisions in state worker compensation laws do not bar migrant workers from bringing a private action under the Migrant and Seasonal Agricultural Worker Protection Act; 29 U.S.C. § 1801 et seq. The Court specifically held that the existence of a federal right is not conditioned upon the unavailability of a state remedy:

> We likewise reject petitioner's contention that, where Congress authorizes a private right of action to vindicate a federal right we should assume that Congress has conditioned that right on the unavailability of a state remedy. Indeed, we have stated that "it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 603, 91 S.Ct. 1746, 1749, 29 L.Ed.2d 206 (1971). Congress may *choose* to establish state remedies as adequate alternatives to federal relief, but federal rights should be regarded as supplementing state-created rights unless otherwise indicated. (emphasis original).

Id. at 1389.

In the case at bar, plaintiff claims a violation of substantive Due Process in that the municipality acted with deliberate indifference by failing to train its employees to protect themselves against a known risk. Although these allegations clearly state a claim under state tort law, they

also state a claim under §1983. A substantive Due Process violation states a claim under §1983 "regardless of any state tort remedy that might be available." *Zinermon*, 494 U.S. at 131. While not all government conduct actionable under state tort law is also actionable under §1983 (negligence is the most conspicuous example), government conduct which may be actionable under state tort law is not automatically precluded under §1983. As already stated, state common law torts and constitutional violations actionable under §1983 are not mutually exclusive.

C. The Government Need Not Act In A Way Essentially Indistinguishable From A Private Employer In Order To State A Claim Under 42 U.S.C. §1983.

The Court below specifically focused upon the issue of whether it is the "alleged wrongful conduct by government - in its capacity as employer rather than as a governing authority - that deprives its employee of an alleged constitutional right give rise to a §1983 action." *Collins*, 916 F.2d at 286. According to the Fifth Circuit, §1983 requires that the government act in a way which is distinguishable from the role of a private employer. *Id.* at 288. [3]

Contrary to the Fifth Circuit's ruling, §1983 does not require conduct which is of "uniquely government character." Numerous §1983 claims arise within the

[3] *See Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986)("The constitution does not assure employees of the government better terms or working conditions or amenities than those available in private employment."); *McClary v. O'Hare*, 786 F.2d 83, 89 n.6 (2nd Cir. 1986)(conduct must be of a "uniquely government conduct").

employment context, and are distinguishable only because the government is the employer.

Clearly, within the private sector a search by an employer would not violate constitutional rights. However, the contrary is true when the search is conducted by a public employer. In *O'Connor v. Ortega*, 480 U.S. 709 (1987) the court considered a §1983 claim by a physician at a state hospital who alleged that hospital officials illegally searched his office and seized personal items from his desk and file cabinet. Generally, the court acknowledged that searches and seizures by government employers are subject to Fourth Amendment protections. *Id.* at 716-17. Significantly, the Court held that "[i]ndividuals do not lose Fourth amendment rights merely because they work for the government instead of a private employer." *Id.* at 717. This same reasoning is applicable in the case at bar. Individuals do not lose their substantive Due Process rights merely because they work for the government.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 1487 (1985), the Court held that the Due Process Clause requires a Pre-termination Hearing for all public employees with a protected property interest in employment. The failure to provide such a hearing is actionable under §1983. *Runge v. Dove*, 857 F.2d 469 (8th Cir. 1987)(Termination violated Due Process where the employer failed to give employee an opportunity to justify his conduct). In the private sector, however, at least non union employees are employees "at will" and have no Due Process rights at all. The only difference is the governmental nature of the employer.

Public employees enjoy First Amendment rights to express themselves on matters of public concern. A termination from employment based on First Amendment

rights may be actionable under §1983. *Connick v. Myers*, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 1056 (1987). In order to find a First Amendment violation the court must determine: 1) Whether the speech is entitled to constitutional protection; 2) whether, if protected, the speech was a substantial or a motivating factor in the action taken; and 3) whether the state could prove that the same action would have been taken in the absence of the protected activity. *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Roth v. Veteran's Administration*, 856 F.2d 1401, 1407 (9th Cir. 1988). Within the private sector, however, expressions of public concern may or may not be actionable depending upon the circumstances and state law. In no event, however, do expressions of public concern in the private sector rise to the level of a constitutional violation.

By way of further analogy, it is clear that sex discrimination or harassment by a public official violates the Equal Protection clause, and is therefore actionable under §1983. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988)("If a state official directly engaged in sexual harassment...he would, of course, be subject to §1983 liability"). [4] However, although the exact same conduct within the private sector would be actionable under state anti-discrimination statutes, the absence of any state action would preclude a constitutional violation.

[4] Accord: *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3rd Cir. 1990)("To bring a successful claim under §1983 for denial of equal protection, plaintiff's must prove the existence of purposeful discrimination"); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986)(Sex discrimination may form the basis of a claim under §1983, citing numerous cases).

II. THE TEXAS HAZARD COMMUNICATION ACT CREATES A LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE.

An additional issue before the Court is whether the Texas Hazard Communication Act creates a substantive Due Process liberty interest the violation of which is actionable under §1983.[5] In that regard, it is clear that "liberty interests protected by the Fourteenth Amendment may rise from two sources - the Due Process Clause itself and the laws of the states." *Hewitt v. Helms*, 459 U.S. 460, 465 (1983); *Mills v. Rogers*, 457 U.S. 291, 300 (1982)("State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution."). Independent from the substantive Due Process violation associated with the respondent's deliberate indifference in training, the State of Texas has created a substantive Due Process liberty interest by the enactment of the Texas Hazard Communication Act. "Stated simply, a state creates a protected interest by placing substantive limitations on official discretion." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 459 (1989).

The adoption of mere procedural guidelines alone is insufficient to create the necessary liberty interest. *Helms*, 459 U.S. at 467. However, the necessary substantive limitations on official discretion is created by the use of "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will' or 'must' be employed." *Id.*

[5] This issue was not addressed in the court below. *See Collins*, 916 F.2d at 287 n. 3.

of an unmistakably mandatory character. Section 10(a) of the act provides that "[e]very employer *shall* provide, at least annually, an education and training program for employees using or handling hazardous chemicals....New or newly assigned employees *shall* be provided training before working with or in a work area containing hazardous chemicals." (Emphasis added). Clearly, this statute does more than create mere procedural guidelines. The mandatory language used by the statute allows for no discretion by municipal officials. The failure of the respondent to provide the mandated training and equipment has resulted in the deprivation of petitioner's liberty. This deprivation is actionable under §1983.

The petitioner has alleged that the respondent was deliberately indifferent to the training of its employees, and that this indifference was the proximate cause of petitioner's death. These allegations are sufficient to state a claim under 42 U.S.C. §1983. Petitioner need not allege abuse of government power as an element in addition to a constitutional violation. The availability of a state tort remedy does not preclude a §1983 claim. Private citizens do not lose their constitutional rights merely because they work for the government instead of a private employer.

CONCLUSION

For these reasons, Amicus urges this Court to reverse the judgment of the court below.

Respectfully Submitted

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